BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Catherine Jeffrey dated July 18, 1995, alleging discrimination in employment and harassment on the basis of handicap.

B E T W E E N:

Ontario Human Rights Commission

- and -

Catherine Jeffrey

Complainant

- and -

Dofasco Inc.

Respondent

INTERIM DECISION

Adjudicator : Matthew D. Garfield

Date : June 15, 2000

Board File No: BI-0183-98

Decision No : 00-011-I

Board of Inquiry (*Human Rights Code*)
505 University Avenue
2nd Floor, Toronto, On M5G 2P3
Phone (416) 314-0004 Fax: (416) 314-8743 Toll free 1-800-668-3946
TTY: (416) 314-2379 / 1-800-424-1168

APPEARANCES

Ontario Human Rights Commission	)	M. Huberman and R. Townshend, Counsel J. Stopford (student-at-law)
Catherine Jeffrey, Complainant	)	Herself
Dofasco Inc., Respondent	)	Michael Hines and P. Ross, Counsel

INTRODUCTION

These are my reasons for decision on a motion brought by the Ontario Human Rights Commission (the "Commission"), for an order amending the Complaint of Catherine Jeffrey to add three allegations of harassment in employment and the ground of reprisal pursuant to sections 5(2) and 8 respectively, of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*").

ISSUE

Should the Board exercise its discretion to add the new allegations and ground? In considering this, has the Respondent demonstrated actual prejudice of such magnitude that it would be an abuse of the Board's process to add the new allegations and ground of reprisal?

DECISION

The motion is granted. Dofasco has not demonstrated actual prejudice of such magnitude as to amount to an abuse of the Board's process.

BACKGROUND

This case involves the Complaint of Catherine Jeffrey alleging that Dofasco discriminated against her in the workplace by terminating her employment on March 14, 1994 without first accommodating her disability to the point of undue hardship. Ms Jeffrey filed the Complaint with the Commission on July 18, 1995. The subject-matter of the Complaint was referred to the Board and it commenced the hearing by way of conference call on November 3, 1998.

On January 27, 1999, the Commission filed its Statement of Facts and Issues. In it, the Commission gave notice that it intended to move before the Board that it be allowed to amend the Complaint. In particular, it wanted to add allegations of harassment and reprisal with respect to three incidents (the "New Allegations") involving: withholding benefits to Ms Jeffrey (the "Benefits Allegation"); surveillance of her (the "Surveillance Allegation"); and excessive visits by a Dofasco visitation representative (the "Visits Allegation").

BOARD'S POWER TO AMEND COMPLAINT

The Commission argues that previous case law at the Board establishes that it has the jurisdiction to amend a human rights complaint referred by the Commission provided that the principles of natural justice are respected. In oral submissions, counsel says that "it is routine" for amendments to be made. See following Ontario Board decisions: *Cousens v. Canadian Nurses Association* (1980), 2 C.H.R.R. D/365 at 365-66; *Barnard v. Fort Frances Board of Police Commissioner* (1986), 7 C.H.R.R. D/3167.

According to the Commission, it is especially appropriate to amend a complaint to add allegations of harassment or reprisal. See *Entrop v. Imperial Oil (No. 3)* (1994), 23 C.H.R.R. D/186 at 186 (Ont. Bd. Inq.); *Joe v. University of Toronto (No. 1)* (1995), 25 C.H.R.R. D/472 at 484-5 (Ont. Bd. Inq.);

Dofasco agrees that the Board has the authority to make the order sought but only where a respondent has received adequate notice, does not suffer prejudice, has an opportunity to respond and the requirements of natural justice are met. In this case, Dofasco submits that "If the Commission's motion to amend the Complaint is granted, Dofasco will be prejudiced by its inability to avail itself of the processes and rights identified by the statutory scheme of the *Code*." Specifically, the Commission failed to investigate the allegations contained in the proposed amendments, failed to attempt to effect a settlement involving these allegations and failed to consider them at the referral stage (s. 36). Because of this, Dofasco was denied the protections of the *Code*, including a section 34 request not to deal with these aspects (due to the frivolous, vexatious nature, etc.) and a reconsideration route.

I do not agree with Dofasco's submissions that the lack of these statutory pre-conditions being met by the Commission either denies the Board the jurisdiction *ab initio* to make the order requested or amounts to such prejudice that I should not exercise my discretion to do so. The Board does not supervise the actions and conduct of the Commission. It is not for the Board to say if the Commission exceeded its jurisdiction or failed to satisfy a statutory prerequisite or pre-condition. That is the job of the Divisional Court on judicial review. See following Ontario Board decisions: *Findlay v. Four Star Variety* (1993), 21 C.H.R.R. D/19, at para. 83; *Anonuevo v. General Motors of Canada Ltd.*, [1998] O.H.R.B.I.D. No. 7, at paras. 91 and 93; *Joe*, at 477.

See most recently, *Payne v. Ontario*, [2000] O.J. No. 1896 (Div. Ct.), at para. 5. I add that section 23(1) of the *Statutory Powers and Procedure Act*, R.S.O. 1990, c. S.22, as amended, gives a tribunal the power to "prevent abuse of its processes", not the Commission's process.

While the Board has no general oversight powers over the Commission, it is not correct to say that the pre-referral situation is never relevant to the Board's proceedings. As Adjudicator McKellar wrote in *Anonuevo* at para. 91:

> The Board may, however, be required to assess what lasting impact the Commission's handling has had on the fairness of the proceeding before it and particularly on the ability of a respondent before the Board to make full answer and defence to the allegations against it.

See also *Joe* at paras. 30 and 35. I will address the ability of Dofasco to make full answer and defence and the issue of prejudice amounting to an abuse of process later in my reasons.

The issue of amending a complaint came before the Board in *Wight v. Ontario* (1994), 25 C.H.R.R. D/169. The respondents contended that it was an abuse of process to add sexual harassment under section 7(2) of the *Code* as they had not received notice as it was not in the original complaint, similar to the motion before me. Accordingly, the respondents never investigated the matter or prepared a defence around that issue. The Board granted the motion to amend the complaint. I agree with the following reasoning at D/173:

> Once a board of inquiry is established, it is required, by statute, to determine if a right of the complainant has been infringed. I cannot accept Mr. Hayter's argument that the board is restricted to inquiring into the specific allegations raised in the complaint. The written complaint is not similar to the pleadings or information in a civil or criminal proceeding. There is no process of discovery prior to the hearing. If it was intended that a board of inquiry be restricted to the actual and precise allegations set out in the complaint, the legislature would have taken steps to insure that all of the procedural safeguards present in the court proceeding would apply as well. It did not because it intended the board to hear the matter *de novo*. If the legislature intended to restrict the inquiry to the allegations in the original complaint, it could have expressly stated so when drafting s. 39. It did not state that the board of inquiry was to determine whether the right claimed in the complaint had been infringed...
>
> A board of inquiry is charged with the responsibility of determining whether a right has been infringed. That includes a finding of discrimination on any prohibited ground, not simply the one specified in the original complaint.

The *de novo* nature of an inquiry before the Board was highlighted recently by the Ontario Court of Appeal in *McKenzie Forest Products Inc. v. Tilberg*, [2000] O.J. No. 1318. At para. 41, the Court wrote:

> Once a complaint has been referred to the Board of Inquiry, there is no provision in the *Code* which limits the Board of Inquiry's obligation to conduct a hearing into a complaint.

I agree with the comments of the Board in *Entrop* at 187 and *Joe* at 484-85. In *Entrop*, the Board stated that it was preferable to amend a complaint to add allegations of reprisal rather than necessitating the filing of a new complaint at the Commission. At para. 9, the Board wrote:

> It would be impractical, inefficient and unfair to require individuals to make allegations of reprisal only through the format of separate proceedings. This would necessitate their going to the end of the queue to obtain investigation, conciliation and adjudication on matters which are fundamentally related to proceedings already underway.

I note that in *Entrop*, the Respondent received its first notice of the allegations of reprisals on October 4, 1994 – the Board's decision was rendered that same month. Here, Dofasco first received notice in January, 1999.

ABUSE OF PROCESS

The Commission submits that it would not be an abuse of the Board's process for the Board to add the New Allegations. Counsel argues that Dofasco has been aware of the intention to add the New Allegations when the Commission filed its Statement of Facts and Issues in these proceedings in January, 1999. Counsel also says that Dofasco was aware, in a more general way, of allegations of harassment and reprisal when receiving the Commission's document, "Allegations of Systemic Discrimination Against Dofasco", in April, 1998. The Commission argues that Dofasco will have plenty of time to prepare its case before evidence on the merits of the case begins.

In addition to the denial of procedural safeguards provided for in the *Code*, Dofasco argues that it would be an abuse of process for the Board to grant this motion for several reasons. First, Dofasco would be prejudiced by not having received notice of the New Allegations until

January, 1999 in that it could not make a full answer and defence. This is illustrated by the fact that Dofasco "has been prevented from taking its own steps to identify and preserve necessary evidence. This prejudice combined with the inexplicable and unreasonable failure of the Complainant to raise these issues in a timely fashion should lead to a denial of the Motion." Dofasco also argues that it has been prejudiced by the Commission's delay in raising the New Allegations.

The Applicable Legal Test

The legal test to be applied on the question of prejudice to determine whether a hearing before the Board may proceed without an abuse of its process or a denial of natural justice is: **whether or not on the record there is evidence of prejudice of such magnitude as to impact on the fairness of the hearing.** This test was enunciated by the Manitoba Court of Appeal in *Nisbett v. Manitoba (Human Rights Commission)*(1993), 18 C.H.R.R. D/504 at 510 and later adopted by the Ontario Divisional Court in *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)*, [1995] O.J. No. 4292 at para. 16; *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)*, [1999] O.J. No. 2530 at para. 16; and *Leroux v. Ontario (Human Rights Commission)*(1999), 35 C.H.R.R. D/338 at paras. 21 and 47. See also *Chan v. Ontario Power Generation Inc.*, [2000] O.H.R.B.I.D. No. 7 at 12-14.

The New Allegations

According to the Commission's factum and its Statement of Facts and Issues, the New Allegations of harassment and reprisal are as follows:

(a) Dofasco delayed in making available to the complainant medical benefits to which she was entitled as the common law spouse of a Dofasco retiree, Robert Young. The complainant was without medical benefits from the time of her termination in March 1994 until September of 1996, and [*sic*] which point she was provided these benefits, retroactive to September 1995;
(b) Dofasco arranged for surveillance of the Complainant before and after her termination;
(c) Dofasco arranged for excessive visits to the Complainant by Dofasco Inc. employee John O'Toole in the period 1988-1993. These visits were sometimes unannounced, and took place about twice a month. There were occasional phone calls in addition to this.

The Commission submits that all three above constitute harassment in employment. It contends that the Benefits Allegation and the Surveillance Allegation also are examples of reprisal contrary to section 8 of the *Code*. Only the Visits Allegation does not constitute reprisal. I note that the ground of harassment was referred by the Commission to the Board, but the ground of reprisal was not.

While I am sympathetic to Dofasco's concerns about the late notification of the New Allegations, I do not accept that Dofasco was unaware of the facts constituting the Benefits Allegation and the Visits Allegation. Clearly, as the motion record shows, Dofasco did retroactively provide benefits to the Complainant and did send Mr. O'Toole to visit the Complainant. These comments do not apply to the Surveillance Allegation as Dofasco denies that it ever occurred and accordingly, Dofasco had no knowledge of this allegation until the Commission filed its Statement of Facts and Issues in January, 1999. Dofasco does not claim prejudice regarding the Surveillance Allegation (as it does regarding the Benefits Allegation and the Visits Allegation) but relies on its jurisdictional argument (statutory pre-conditions not being met).

Dofasco argues that the New Allegations are wholly unrelated to the allegations found in the Complaint and which were referred to the Board. Are the New Allegations matters which are fundamentally related to proceedings already under way before me? Or are they so unrelated to the original allegations in the Complaint that they fall outside the "subject-matter of the complaint" (per section 36(1) of the *Code*)? The "subject-matter of the complaint" which was referred to the Board on the grounds of discrimination and harassment in employment comprises those events dealing with the Complainant's termination of employment by Dofasco, including her alleged disability. The complaint form operates as a sketch or outline by which the Commission decides whether to investigate or not. The complaint form is a general notice to a respondent. It is not akin to a criminal indictment or information or a civil statement of claim. The human rights regime under the *Code* is very unique - a hybrid process. Once investigated, the section 36 analysis (which does not mention the New Allegations) becomes a key tool by which the Commissioners decide whether to refer the subject-matter of the complaint to the Board. It is not necessary, though preferable, for every allegation to be in the complaint form.

Indeed, it is not the allegations which are referred but instead, the "subject-matter of the complaint". Subject-matter of the complaint does not mean only what is in the complaint form. The Commission specified that harassment was a ground which was being referred and the New Allegations all involve harassment.

A motion to add a ground or allegation should not be refused simply because the allegation or the particulars therein are not identical to the ones found in the original complaint. The Board applied this reasoning in *Wong v. Ottawa Board of Education (No. 2)*(1993), 23 C.H.R.R. D/37. At para. 7, it wrote:

> Neither *Cousens* nor *Tabar*, *supra*, suggests any such restriction to the jurisdiction and duty of a board of inquiry to amend a complaint prior to the termination of the hearing. Rather, the only limitation they appear to suggest was stated this way by Professor Cumming in *Tabar* (at [p. D/1085] para. 9546):
>
> > I emphasize, as did Chairman Ratushney [sic], that the jurisdiction to modify the alleged grounds of discrimination carries with it the obligation of providing adequate notice and where appropriate, the opportunity to adjourn for further preparation.

While the Board may amend a complaint to include allegations not referred or even investigated by the Commission, that does not end the matter. It is necessary for me, in exercising this discretion, to determine if Dofasco has suffered such prejudice that amounts to an abuse of the Board's process.

What is the Actual Prejudice Suffered by Dofasco?

Dofasco filed in support of this motion the sworn affidavit of Robert Primeau, its Manager of Employee Relations. No other evidence was filed. Mr. Primeau deposes that two Dofasco representatives were interviewed by the Commission's investigator in or about December, 1997. He says at para. 5:

> At no time during the course of the investigation or during the interview of Dofasco representatives did the Commission make **any** inquires [*sic*] regarding **any** of the allegations which the Commission has identified as the basis for the proposed amendments to the Complaint. The Section 36 Case Analysis makes **no mention** of any of these allegations. Dofasco was **not advised** of any of the allegations set out in the proposed amendment prior to the service of pleadings in January 1999. [original emphasis]

Benefits Allegation

Dofasco says that it was never notified via a notice of change in benefits status by either the Complainant or her common law spouse, Mr. Young, that she was to be added to Mr. Young's plan. Mr. Primeau states at para. 9, "At no time prior to November 1996 did Mr. Young advise Dofasco that his marital status had changed for benefits purposes." When notified, Dofasco added the Complainant to Mr. Young's coverage, retroactive to 1995.

Mr. Primeau deposes that Dofasco has no other notes or records regarding this issue, other than the ones attached as exhibits to his affidavit: Dofasco's policy regarding health insurance changes; the Complainant's Benefits Enrollment Card; Notice of Termination of Mr. Young; and Mr. Young`s Benefits Enrollment Card.

Mr. Primeau further deposes at para. 10:

> More specifically, Dofasco has **no notes or records** pertaining to what notice, if any, Mr. Young gave Dofasco regarding benefit coverage for the Complainant, why benefit coverage was made retroactive to 1995 or why benefit coverage was not made retroactive to an earlier date. I have made inquiries of the Benefits Department, and am advised that **no person has any recollection** of any issues relating to this allegation. [original emphasis]

There is clearly some evidence regarding this matter. The affidavit does not indicate whether there ever were notes or records dealing with the above questions. It is difficult to determine what actual prejudice was suffered by Dofasco.

Further, a key witness in the matter, Mr. Young, passed away in August, 1997. Accordingly, the Board will not have his testimony to assist in dealing with this issue. It is difficult to gauge whether Mr. Young's testimony would have assisted or hurt the Commission's onus to prove a *prima facie* violation of the Code for obvious reasons: we do not know what his evidence would have been.

Surveillance Allegation

Mr. Primeau denies that Dofasco ever conducted surveillance on the Complainant. No actual prejudice is demonstrated by Dofasco by virtue of being given notice of this allegation in January, 1999. There would be no records or notes or witnesses to interview as Dofasco clearly says that surveillance never occurred. If that bears out in the evidence on the merits, then the Commission will be unable to prove a *prima facie* case regarding this allegation.

Visits Allegation

Dofasco admits that John O'Toole, a Dofasco Visitation Representative, did visit the Complainant. Mr. O'Toole retired from employment with Dofasco in March, 1993. No mention is made of his whereabouts and what steps have been taken to locate him. Mr. Primeau does depose that:

> Dofasco has **no notes or records**, if such notes or records ever existed, of the contacts or the frequency of contacts between Mr. O'Toole and the Complainant.
>
> Dofasco is in possession of a note dated November 25, 1992, a copy of which was provided to the Commission, reflecting the Complainant's appreciation of the assistance of Mr. O'Toole. A copy of this note is attached as Exhibit F to my Affidavit. [original emphasis]

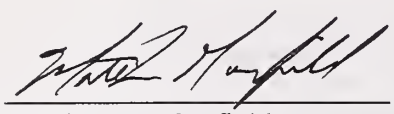
Again, there is some evidence dealing with this issue. There is the note (Exhibit F) and there will be the evidence of the Complainant, which Dofasco will be able to test in cross-examination. Mr. Primeau is not sure if any other notes or records ever existed.

At this stage in the proceedings, I am unable to find actual prejudice of such magnitude that a fair hearing cannot be held before me regarding the New Allegations. I am not convinced from the affidavit of Mr. Primeau and the submissions of counsel that Dofasco is unable to provide a defence as a result of the fact that the Commission only gave them notice of the New Allegations in January, 1999. Adding the New Allegations and the ground of reprisal to the issues before me will not result in an abuse of the Board's process. No date has been set for the commencement of the hearing of the evidence on the merits. Accordingly, Dofasco will have ample time to prepare its defence regarding the New Allegations. Dofasco may bring the motion again if, during the course of the hearing on the merits, further prejudice is demonstrated as to meet the legal test described herein.

ORDER

The motion is granted. The Complaint is amended to add the New Allegations and the ground of reprisal. The Commission shall amend its Statement of Facts and Issues with sufficient particulars and provide disclosure by June 29, 2000. Dofasco shall file its amended Response and disclose any documents regarding the New Allegations not already provided in its motion materials by July 13, 2000. The Deputy Registrar shall contact the parties to arrange a Pre-Hearing Conference call to set hearing dates and deal with any pre-hearing matters.

Dated at Toronto, this 15th day of June, 2000.



Matthew D. Garfield
Vice-Chair